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No. 181

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

RED ARROW FREIGHT LINES, INC., et al, *Petitioners*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Supreme Court of the United States:

Petitioners Red Arrow Freight Lines, Inc., H. P. Brown dba Brown Express, W. A. Johnson dba Johnson Motor Lines, Johnson Storage and Distributing Company, Inc., Merchants Fast Motor Lines, Inc., H. E. English and O. B. English dba Red Ball Motor Freight Lines, Sproles Motor Freight Lines, Inc., and Sproles-Red Ball Lines, Inc., joined by the National Association of Motorized Common Carrier Truck Line Employees, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals on April 11, 1950, for the Fifth Circuit, entered in the above entitled case.

I. OPINION OF THE COURT BELOW

The opinion of the Court of Appeals for the Fifth Circuit, dated March 11, 1950, is reported in 180 Fed. (2d) 585 (Adv. Op.) and attached hereto as Appendix I.

II. A SUMMARY STATEMENT OF THE MATTERS INVOLVED

On March 11, 1950 the United States Court of Appeals for the Fifth Circuit decreed the enforcement[1] of the Order of Respondent against Petitioners.[2] The opinion of the Court of Appeals correctly summarizes Respondent's Order.

On March 30, 1950 Petitioners filed with the Court of Appeals (1) Petition for Rehearing, (2) Motion for Permission to Orally Argue in Support of Petition for Rehearing, and (3) Motion to Remand Proceedings for Further Hearing and Proof on Challenge to Jurisdiction and Lack of Due Process of Law,[3] all of which were denied by order of April 11, 1950, and final decree was entered May 1, 1950. On April 28, 1950, proceedings under the decree were stayed for a period of 90 days from such date.

The Order of Respondent was issued after hearing upon Respondent's complaint issued after charges were

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[1] 180 Fed. (2d) 585. Attached as Appendix I.

[2] May 25, 1948; 77 N. L. R. B. 859; R. 152-160. Note that Petitioners herein were "Respondents" and Respondent herein was "Petitioner" in in the Court of Appeals.

[3] Appendix II. Filed pursuant to 29 U. S. C. A. 160(e).

filed by Teamsters' Union, A. F. of L.[4] The sufficiency of the charge was challenged continuously from the outset. Such order found all Petitioners had violated Sec. 8 (1) and (2) of the National Labor Relations Act (29 U. S. C. A. 158 (1) and (2)) by dominating and interfering with the formation and administration of the National Association of Motorized Common Carrier Truck Line Employees ("Association") and by contributing support to it. Such Order further found Petitioner Red Ball Motor Freight Lines ("Red Ball") had discharged two employees in violation of Sec. 8 (3) and (1) of the Act (29 U. S. C. A .158 (3) and (1)).

In view of the voluminous pleadings, evidence, and brief, Petitoners are content to rely upon the summary of facts pertaining to the Complaint of Respondent on the issue of "dominating and interfering with the formation and administration of the 'Association' and by contributing support to it" as found by the Court of Appeals.[5]

The facts are clear that the two employees "discharged," one quit (B. A. 124)[6] and the other was discharged because he was arbitrary and belligerent, and a chronic complainer (R. A. 225 et seq).

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[4] Required by Sec. 203.9, *Rules & Regulations of the N. L. R. B.*, then effective. Sec. 203.11 provides the manner of preparation and execution of such charge.

[5] "There appears, however, to have been no employer intimidation or coercion in the formation of this Union for it is quite clear that the men formed it: (a) after talking to the Regional Director in Texas of the N. L. R. B., who advised them that they could do so; (b) after making inquiries as to whether or not they could join one of the transportation unions; (c) and after visiting a meeting of a local union in the A. F. of L." See Appendix I.

[6] Herein Transcript before Examiner is Tr., Board's Appendix is B. A., Petitioners' (then Respondents') Appendix is R. A.

III. JURISDICTION OF THIS COURT

The decision of the Court of Appeals for the Fifth Circuit[7] sought to be reviewed is dated March 11, 1950. Petition for Rehearing was filed March 30, 1950 and denied April 11, 1950, and final decree entered May 1, 1950. This Petition is, therefore, timely filed under 28 U. S. C. A. 2101.

The jurisdiction of this Court is invoked under 28 U. S. C. A. 1254 (1).

IV. QUESTIONS PRESENTED

The controlling questions presented in this Petition are:

1. In finding that "no employer intimidation or coercion" existed, did not the Court of Appeals completely negate any premise in the order of the Board to warrant enforcement?

2. Whether or not, as found by the Court of Appeals, the action of employers "not coercively, not threateningly, but by means which, perhaps, more effectively let it be known that it was the pleasure of such employers that the employees should associate themselves with the "Association," constituted an unfair labor practice.

3. Whether or not the Board was required to follow its own rule as to the form, contents, and manner of execution and verification of a charge as a condition precedent to the valid issuance of a complaint and order based thereon.

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[7] Appendix I. 180 Fed. (2d) 585.

4. Do the rules of Board, promulgated pursuant to statute, have the force and effect of law?

5. Is the construction and effect of a jurat required by Board rule governed by local law?

6. Is the Board bound by its rule and construction thereof where in one proceeding it holds the rule binding and jurisdictional, and in the subsequent proceeding seeks to waive the rule, to the prejudice of the parties?

7. Did the Court of Appeals err in failing to grant Petitioners "Motion to Remand Proceedings for Further Hearing and Proof on Challenge to Jurisdiction and Lack of Due Process of Law"?[8]

8. Is the Board's Order invalidated by its failure to follow the provisions of the Administrative Procedure Act in these proceedings?

9. Is the order as to reinstatement barred by the provisions of Sec. 10 (b) of the Taft-Hartley Amendments?

10. Does the Board's Order requiring complete disestablishment of Association exceed the bounds of propriety in view of the Court of Appeals' finding that it was the choice of employees?

11. Is there substantial evidence to support the order of reinstatement and payment to two former employees of Red Ball?

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[8] Appendix II.

V. REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. This Court of Appeals decision is in conflict with the decisions of Court of Appeals of other Circuits on the same matter:

a. The holding that the action of employers in letting "it be known that it was the pleasure of such employers that employees should associate themselves" with Association constituted an unfair labor practice, is in direct conflict with *N. L. R. B. vs. American Tube Bending Company, Inc.*, 134 Fed. (2d) 993 (2 Cir. 1943), *N. L. R. B. vs. J. L. Brandeis & Sons*, 145 Fed. (2d) 556 (8 Cir. 1944), *Pittsburgh S. S. Co. v. N. L. R. B.*, 180 Fed. (2d) 731 (6 Cir. 1950), which recognize the right of free speech accorded employer under the first amendment where no intimidation was exerted.

b. In holding that a rule promulgated by a board (such as Respondent) is not "subject to the strictness of common law pleadings" but may be waived, contrary to *Latgis vs. U. S.*, 97 Fed. (2d) 588 (4 Cir. 1938), and *Sawyer vs. U. S.*, 10 Fed. (2d) 416 (2 Cir. 1926), which hold such rule to have the force and effect of statute.

c. In holding that strict compliance with Board Rule 203.11 was not a condition precedent to jurisdiction of the Board, contrary to *Board vs. Popper*, 113 Fed. (2) 602 (3 Cir. 1940); *Board vs. Hopwood Retinning Co.*, 98 Fed. (2d) 97 (2 Cir. 1938); *Board vs. National Licorice Co.*, 104 Fed. (2d) 655 (2 Cir. 1939), and many others.

Sec. 203.11, *Rules and Regulations of N. L. R. B.*, effective at time of filing of alleged charge, provided:

> "Such charge shall be in writing, the original signed and sworn to before any Notary Public, Board Agent, or other person duly authorized by law to administer oaths and take acknowledgments."

The alleged charge (Tr. 17-67) was shown to have been made by "International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America," signed by "James B. Turner, Business Representative" with the following certificate:

> "Subscribed and sworn to before me this 23rd day of October, 1946, at Dallas, Texas, as true to the best of deponent's knowledge, information and belief.
>
> Wallace C. Reilly
> Board Agent or Notary Public"

The alleged charge is invalid for the following reasons:

(1) The signer did not purport to have authority of the International to make such charge. (R. A. 270-279).

(2) The affidavit is invalid because it does not show that Wallace C. Reilly was an officer authorized to administer the oath or certify thereto.

(3) The affidavit and charge were not sworn to nor executed by affiant in such manner that he might be prosecuted for perjury in the event of misstatement as to contents.

The Court of Appeals erroneously found that it was not the intention of Congress to require the strictness of "common law pleading in either the charges or the complaint in cases of this type." This, however, is contrary to *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1189, and others, in that there is no Federal common law and Congress has no power to declare substantive rules of common law applicable. Texas substantive rules applicable to the affidavit are to the following effect:[9]

1. An affidavit to the best of deponent's "knowledge, information and belief" is invalid. *Smith v. Banks*, 152 S.W. 449; *Calyon v. State*, 174 S.W. 591; *Lane v. Jones*, 167 S.W. 177; *Spinks v. Mathews*, 15 S.W. 1101; *Robertson, et al. v. Economy Plumbing Co., et al.*, 269 S.W. 481; *Jackson, et al. v. Ricoro* (Writ dism.), 152 S.W. (2d) 910.

2. The jurat is defective for failure to show the official capacity of the party taking the affidavit. *Neely v. State*, 161 S.W. (2d) 294; *Stanley v. State*, 158 S.W. (2d) 785; *Midkiff v. State*, 209 S.W. (2d) 354; *Stacy v. State*, 258 S.W. 475; *Shurbet v. State*, 60 S.W. (2d) 791; *Carpenter v. State*, 218 S.W. (2d) 207.

In *Board v. Popper*, 113 Fed. (2d) 602 (3 Cir. 1940), the Court pointed out that a Board rule requiring the charge to be sworn to was "so that the affiant might be prosecuted for perjury in case he made a willful misstatement in regard to a material matter." Here, that could not be done. Such a charge is a condition precedent to the Board's power to issue a complaint. *Board v. National Licorice Co.*, 104 Fed. (2d) 655 (2

[9] For applicable Texas statutes, see Appendix III.

Cir. 1939); *Board v. Hopwood Retinning Co.*, 98 Fed. (2d) 97 (2 Cir. 1938).

The Board itself requires the charge to specify the complainant and respondent. In *Seamprufe, Inc.*, 82 N. L. R. B. 892, the complaint against the union was dismissed, as the charge upon which the complaint was based named only an agent of the union and did not name the union as the person charged, as required by Board rules. In the instant proceeding the signer of the charge did not even purport to sign as the representative of the International, and there was a variance between the named complainant and the signature. Since the Board has heretofore construed its requirements as to the complaint with definiteness, the rule of almost administrative finality to the construction by administrative bodies on questions of construction of their orders and powers is applicable here. *U. S. vs. American Trucking Assns.*, 310 U. S. 534, 84 L. Ed. 1345; *Southland Gasoline Co. v. Bayley*, 319 U. S. 44, 87 L. Ed. 1244; *Levinson v. Spector Motor Service*, 330 U. S. 649, 91 L. Ed. 1158.

Such rule, having been promulgated as a rule of procedure in the conduct by the Board of its duties prescribed by statute, has the force and effect of statute. *Latgis v. U. S.*, 97 Fed. (2d) 588 (2 Cir. 1938); *Arizona Grocery Co. v. Ry. Co.*, 284 U. S. 370, 76 L. Ed. 348; *Manhattan General Equip. Co. v. Comm. of Int. Rev.*, 297 U. S. 129, 80 L. Ed. 528, aff. 76 Fed. (2d) 892; *Sawyer v. U. S.*, 10 Fed. (2d) 416 (2 Cir. 1926); *Penick & Ford v. U. S.*, 12 Ct. Cust. App. 432; *Stegall v. Thurman*, 175 Fed. 813; *In Re Aliens*, 231 Fed. 335; *Tindle v. Heiner*, 17 Fed. (2d) 522, rev. 18

Fed. (2d) 452 (3 Cir. 1927), rev. 276 U. S. 582, 72 L. Ed. 714; *Fowler v. U. S.*, 11 Fed. (2d) 895, aff. 16 Fed. (2d) 925 (5 Cir. 1927).

The alleged charge, a condition precedent to a valid complaint, is invalid, therefore, for the following reasons:

(1) The Board is bound by its own rule as to the requisites of a charge and cannot waive such, as such rule has the force and effect of statute.

(2) The construction of the Board of its rule as to the requisites of a charge is entitled to great weight and almost administrative finality.

(3) The sufficiency of the affidavit in the charge is tested by the local law. The affidavit being insufficient under the Texas law, the charge is invalidated.

The charge being invalid, the order based thereon cannot be enforced.

d. In requiring complete disestablishment of Association by petitioners in spite of its finding of no "intimidation or coercion," contrary to *N. L. R. B. vs. Gilfillan Bros., Inc.*, 148 Fed. (2d) 990 (9 Cir. 1945), wherein the Court modified the omnibus order of the Board requiring complete disestablishment so as to only prohibit employer from dominating or interfering with the union.

2. This Court of Appeals decision decides an important question of local law in conflict with applicable local decisions:

a. In holding that it was not "the intention of Congress to require the strictness of common law plead-

ings in either the charges or the complaint in such cases even though the rule specified the form, contents, and manner of execution of the charge. The determination of compliance of the oath and jurat with law is an important question of the local law of Texas, the situs of the action, and the holding of the Court of Appeals is contrary to Texas law. (See 1. (c) hereof, p. 6, supra.)

3. This Court of Appeals decision has decided an important question of federal law which has not been, but should be, settled by this court:

a. In holding that the rules of the Board could be waived by the Board and that it was not "the intention of Congress to require the strictness of common law pleadings in either the charges or the complaint in such cases," even though as to other boards and agencies the courts have held the rules to have the force and effect of statute when promulgated pursuant to law. *Latgis vs. U. S.*, 97 Fed. (2d) 588 (4 Cir. 1938); *Arizona Grocery Co. vs. A. T. & S. F. Ry. Co.*, 76 L. Ed. 348; *Manhattan General Equipment Co. v. Commissioner*, 80 L. Ed. 528, Aff. 76 Fed. (2d) 892; *Sawyer vs. U. S.*, 10 Fed. (2d) 892 (2 Cir. 1926); *Fowler vs. U. S.*, 11 Fed. (2d) 895, Affd. 16 Fed. (2d) 925 (5 Cir. 1927), and many others. (See 1. (c) hereof, p. 6, supra.)

b. In holding that it was not necessary that the Board apply its Rule 203.11 to the Charge herein, even though compliance with such rule was held by the Board in *Seamprufe, Inc.*, 23 L. R. R. M. 1646, 82 N. L. R. B. 106, as a condition precedent to jurisdiction

of the Board. (See 1. (c) hereof, p. 6, supra.)

c. In requiring reinstatement of and payment to two former employees of Red Ball based upon a charge and complaint filed more than 6 months subsequent to their leaving the service of Petitioner, contrary to Sec. 10 (b) of the Taft-Hartley Amendments (29 U. S. C. A. 160 (b)). *Pittsburgh S. S. Co. v. N. L. R. B.*, 180 Fed. (2d) 731 (6 Cir. 1950).

4. This Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this court:

a. The holding that the action of the employers in letting "it be known that it was the pleasure of such employers that employees should associate themselves" with Association constituted an unfair labor practice, is in direct conflict with *N. L. R. B. vs. Virginia Electric & Power Co.*, 314 U. S. 469, 86 L. Ed. 348, wherein this court specifically held that the employer is free to express his views as to choice of unions so long as no threats nor intimidation are exerted. (See 4. (d) herein, p. 13, infra.)

b. The holding that it was not necessary that the Board follow its Rule as to the contents, form, and manner of execution and verification of a charge as a condition precedent to jurisdiction of the Board, even though prior thereto in *Seamprufe, Inc.*, 23 L. R. R. M. 1646, 82 N. L. R. B. 106, the Board had held compliance with such rule a condition precedent to the Board's jurisdiction. Such holding is in conflict with the rule applied in *United States vs. American Trucking Associations*, 310 U. S. 534, 84 L. Ed. 1345, *Southland Gaso-*

line Co. vs. Bayley, 319 U. S. 44, 87 L. Ed. 1244, *Levinson vs. Spector Motor Service*, 330 U. S. 649, 91 L. Ed. 1158, and cases following, giving almost administrative finality to the construction of their own orders and powers. (See 1. (c) hereof, p. 6, supra.)

c. In holding that a rule promulgated by a board (such as Respondent here) is not "subject to the strictness of common law pleadings" but may be waived without giving it the force and effect of statute, contrary to *Arizona Grocery Co. vs. Ry. Co.*, 76 L. Ed. 348; *Manhattan General Equipment Co. vs. Commissioner*, 80 L. Ed. 528; and many others. (See 1. (c) hereof, p. 6, supra.)

d. In failing to give effect to the provisions of the Administrative Procedure Act and the Taft-Hartley Amendments and remand the proceedings for action consistent therewith, contrary to *N. L. R. B. vs. Pittsburgh Steamship Co.*, 337 U. S. 656, 93 L. Ed. 1159.

The charge herein was filed October, 1946, the complaints served in November, 1946, hearings thereon conducted from December, 1946 to March, 1947, the Examiner's Recommendation served June 10, 1947, and the Order of the Board issued May 25, 1948.

In August, 1947, between the service of the Examiner's recommendation and the issuance of the Board's order, the Taft-Hartley Amendments became effective.

Under Section 12, Administrative Procedure Act, the Act, with the exception of Sections 7, 8, and 11, took effect 3 months after its approval or on September 11, 1946, which latter date was prior to the initiation of the proceedings involved in the case at bar. Sec-

tions 7 and 8 became effective 6 months after approval, or December 11, 1946. Section 11 became effective one year after approval, or June 11, 1947. The only savings clause in the Administrative Procedure Act is the concluding clause of Section 12 thereof, as follows:

> "... no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement."

Thus, the only savings clause of the Administrative Procedure Act pertains to matters of procedure and in no manner pertains to matters of substantive law, such as the form of an affidavit as dealt with herein in "V. Reasons Relied on for Allowance of Writ," 1. (c), p. 6, supra.

All sections of the Administrative Procedure Act were effective prior to the initiation of the proceeding at bar, with the exception of Sections 7, 8, and 11 of the Act. Sections 7 and 8 became effective during the hearing and prior to the issuance of an intermediate report, and Section 11 became effective on June 11, 1947, while the intermediate report is shown to have been dated June 10, 1947. All sections of the Act became effective prior to the Decision and Order of the Board.

The Taft-Hartley amendments so changed the Wagner Act as that the acts complained of in respect to unfair labor charges against petitioners no longer exist. Further, the changes with respect to administration by the Board are so material so to preclude the Board from adopting the findings of a trial examiner, as here, and it is mandatory that the Board must have

read and decided in accordance with the procedure prescribed by such amendments:

(1) Sec. 8 (c) has the effect to prohibit the Board from treating statements of opinion as evidence of interference on the part of the employer.

(2) Sec. 4 eliminates the supervisory employees of the Review Section by prohibiting the Board from employing attorneys to review transcripts of hearings and prepare drafts of opinions unless the attorneys report directly to Board members. Under the Wagner Act, supervisory employees reviewed and revised memoranda or transcripts prepared by the Review Section attorneys, even though the supervisors had not seen the transcripts nor familiarized themselves with the briefs and bills of exception. The recommendations of these supervisors, rather than the recommendation of the attorneys actually preparing the cases, went to the Board. Under the Taft-Hartley amendments, attorneys may still be employed to review transcripts and prepare drafts but these go directly to the individual Board members.

(3) Under the Wagner Act before a trial examiner issued his report, its contents were reviewed, changed, or influenced by supervisory employees in the Trial Examiner Division. The Taft-Hartley amendments by prohibiting review of a trial examiner's report "by any person other than a member of the Board or his legal assistant" obviated the need for supervisory or reviewing personnel in the Trial Examining Division.

In view of the accepted practice existing under the Wagner Act, under which the case at bar was tried,

and the subsequent Taft-Hartley amendments after the issuance of the trial examiner's report but before the Board's order, the proceedings were nullified. At that time, petitioners sought to have the Board order a new trial and hearing in accordance with the provisions of the Taft-Hartley amendments, but the Board failed and refused so to do. Consequently, the order here sought to be enforced is void as not in compliance with the Taft-Hartley amendments.

It is obvious that the trial examiner and the Board considered the ex parte affidavits of the Board's witnesses, viz. Broadnax (Tr. 269), Shafner (Tr. 1312), Head (Tr. 1351), Harris (Tr. 1444), Griner (Tr. 1334 et seq. Board Exhibit 25), Thomas (Tr. 1637-1639), Newton (Tr. 1814), Blanton (Tr. 1869), which ex parte affidavits were used to contradict and impeach witnesses in some instances and in other instances as testimony to establish direct allegations in the complaint. The Board's order even treated such as "testimony," and though this was brought to the attention of the Court of Appeals, the Court did not pass thereon.

In *N. L. R. B. vs. Pittsburgh Steamship Company*, 337 U. S. 656, 93 L. Ed. 1602, this Court considered a judgment of the Court of Appeals for the Sixth Circuit denying enforcement of an order of the Board on the ground of bias of its Examiner, and it was urged, substantially as here, that in the interim period between the issuance of the Board's Order and the Court of Appeals' decision, the Administrative Procedure Act became effective. The Court speaking through Mr. Justice Rutledge, stated:

"Without doubting the existence here of evidence substantial enough under the Wagner Act, Consolidated Edison Co. v. National Labor Relations Bd., 305 US 197, 229, 83 L. ed. 126, 140, 59 S. Ct. 206, to warrant the Board's findings, we are not certain whether that standard controls this case. For questions have arisen whether the Administrative Procedure Act (June 11, 1946), 60 Stat. 237, c 324, 5 U. S. C. A. § § 1001 et seq., 2 FCA Title 5 § § 1001 et seq., and the Taft-Hartley Act (June 23, 1947), 61 Stat. 136 c 120, 29 USCA § § 141 et seq., 9 FCA Title 29 § § 141 et seq., enacted between issuance of the Board's Order and the Court of Appeals' decision, are applicable to and if applicable in any way affect Board procedures and the scope of judicial review of Board orders. The applicability and possible effect of either or both of these statutes apparently were not dealt with by the Court of Appeals, which neither discussed the statutes nor cited cases discussing them; the statutes and their impact have not been briefed with any elaboration before this Court. These questions should be considered in the first instance by the Court of Appeals. Accordingly, in order to afford such an opportunity, we remand the cause to the Court of Appeals for proceedings not inconsistent with this opinion."

Upon remand, the Court of Appeals for the Sixth Circuit in 180 Fed. (2d) 731 (6 Cir. 1950), held the Administrative Procedure Act and the Taft-Hartley amendments to be remedial and applicable to pending actions, and reviewed the entire record and made fact findings as to whether there was substantial evidence to support the findings of the Board. The court point-

ed out that under these amendments the following changes in law appeared:

(1) "These statutes were designed to eliminate the wholesale use of hearsay, the drawing of expert inferences not based upon evidence, and the consideration of only one part or one side of the case."

(2) Sec. 10(c) of the Taft-Hartley Act "contains the specific provision that no order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay if such individual was suspended or discharged for cause."

(3) The amendment embodied in Sec. 8(c) of the Taft-Hartley Act "was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct."

Furthermore, Section 10 (b) of the Taft-Hartley Amendments provides "that no complaints shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge." This is a change made in the Taft-Hartley Amendments not heretofore existing in the Wagner Act.

The order of the Board complained of and which the court would enforce directs the reinstatement of

J. D. Cranford and F. L. Thomas. Yet, Paragraph 37 of the complaint alleges that "Respondent, Red Ball, did on or about April, 1944, discharge F. L. Thomas, employed at its business in Dallas, Texas, and that all times since that date, until on or about July, 1944, did fail to, refuse to, and continue to refuse to reinstate said employee to his former or substantially equivalent position or employment." Paragraph 39 of said complaint alleges that "Respondent, Red Ball, did on or about October 6, 1945, discharge J. D. Cranford, employed at its place of business in Dallas, Texas, and that all times since said date has failed to, refused to, and continues to refuse to reinstate said employee to his former or substantially equivalent position or employment." As stated before, the charge was not filed until October 23, 1946, and the complaint in November, 1946, both more than six months after the alleged acts. In addition to being a "stale demand" and the claimants being guilty of laches, such alleged acts are barred under the Taft-Hartley Amendments.

These questions as to the extent of the application of the provisions of the Administrative Procedure Act and the Taft-Hartley amendments were not passed on by the Court of Appeals in the case at bar, though properly raised. It is recognized that it is not the function of this court to review in the first instance the sufficiency of evidence without its prior consideration by the lower court. *Board v. Donnelly Garment Co.* (1947), 330 U. S. 219, 91 L. ed. 854; *Pittsburgh S.S. Co. v. Board* (1950), 180 Fed. (2d) 731. Yet, it is clear that they are matters which must be

passed upon by the lower court in light of these amendments. Therefore, in view of the precedents of this court, this court should take jurisdiction for the purpose of review with a view to reverse or to remand with instructions.

5. The Court of Appeals decision has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the Board, as to call for an exercise of this court's power of supervision:

a. In requiring reinstatement and repayment to the two employees of Red Ball, since there was no substantial evidence of unfair labor practices but only substantial evidence that one resigned and the other was discharged for misconduct. *Pittsburgh S.S. Co. v. N. L. R. B.*, 180 Fed. (2d) 731 (6 Cir. 1950).

b. In ordering enforcement of the order complained of after that Court had found that conditions alleged to constitute the unfair labor practices did not exist. Contention was properly made before the Court of Appeals there was no substantial evidence to support (a) the finding of unfair labor practice, or (b) the order of reinstatement, and the only affirmative finding of the Court of Appeals on the question of substantial evidence to support the order of the Board was that there was "no employer intimidation or coercion,[10] two

[10] The unfair labor practices are prescribed by statute (29 U. S. C. A. 158):

"Section 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ."

of the three general charges of unfair labor practices upon which the Board predicated its order. The third ground, under 29 U. S. C. A. 158(3), related to the discharge of Red Ball employees Thomas and Cranford.

The only finding by the Court of Appeals intended to support the order of the Board is found in the following language of the Court:

> "We cannot say that there is not substantial evidence in the record to support the Board's findings that in the dawn of this Union, some ten or twelve years ago, the employers took an all-too active part—not coercively, not threateningly, but by means which, perhaps, more effectively let it be known that it was the pleasure of such employers that the employees should associate themselves with the independent union which Craig, a highly placed employee, had devised."

Such action on the part of employers did not constitute an unfair labor practice, as has been held by this court in *N. L. R. B. v. Virginia Electric and Power Co.*, 314 U. S. 469, 86 L. ed. 348, and followed in *N. L. R. B. v. American Tube Bending Company, Inc.*, 134 Fed. (2d) 993 (2 Cir. 1943); *N. L. R. B. v. J. L. Brandeis & Sons*, 145 Fed. (2d) 556 (8 Cir. 1944); *Pittsburgh Steamship Co. v. N. L. R. B.*, 180 Fed. (2d) 731 (6 Cir. 1950); and others.

As stated, the Court of Appeals did not pass upon the contention of no substantial evidence to support the order of reinstatement of former employees Cranford and Thomas, yet the substantial evidence will only support a finding that Cranford was properly

discharged for misconduct and that Thomas resigned.

Since the facts found by the Board to support the conclusion of unfair labor practices—i.e., intimidation, domination, coercion, and discharge for labor activity—are not supported by the findings of the Court of Appeals but, contrarily, the Court of Appeals finds no domination, intimidation or control and failed to find any substantial evidence to support the Board's finding as to discharge of Cranford and Thomas for labor activity, this Court cannot be expected to reexamine the record to find any substantial evidence to accord support to the Board's order. *N. L. R. B. v. Donnelly Garment Co.*, 330 U. S. 219, 91 L. ed. 854. Accordingly, this Court can but hold as error the action of the Court of Appeals in declaring such order of the Board to be reinforced. The Court of Appeals having found as it did, this Court can be expected only to hold the judgment of enforcement of the Board's order as contrary to the accord by the Court of Appeals of the substantial evidence.

WHEREFORE, Petitioners, joined by Association, respectfully pray that a Writ of Certiorari issue out of and under the Seal of this Honorable Court, directed to the Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket: No. 12672, National Labor Relations Board, Petitioner vs. Red Arrow Freight Lines, Inc.; and that the judgment of the United States Court of Appeals for the Fifth Cir-

cuit be reversed with appropriate directions by this Court; and for such other and further relief as to this Honorable Court may seem just and proper.

Respectfully submitted,

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July, 1950.

APPENDIX I

In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 12672

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

RED ARROW FREIGHT LINES, INC., et al.,
Respondents.

Petition for the Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(March 11, 1950.)

Before HOLMES, WALLER, and RUSSELL, Circuit Judges.

WALLER, Circuit Judge: The National Labor Relations Board seeks enforcement of its order against Red Arrow Freight Lines, Inc., H. P. Brown, d/b/a Brown Express, W. A. Johnson, d/b/a Johnson Motor Lines, Johnson Storage & Distributing Company, Inc., Merchants Fast Motor Lines, Inc., H. E. English and O. B. English, d/b/a Red Ball Motor Freight Lines, Sproles Motor Freight Lines, Inc., Sproles-Red Ball Lines, Inc., wherein the Board ordered that the Respondents, Red Arrow Freight Lines, Inc., H. P.

Brown, W. A. Johnson, Johnson Storage & Distributing Company, Inc., Merchants Fast Motor Lines, and Sproles Motor Freight Lines, Inc., shall:

1. Cease and desist from:

(a) Dominating or interfering with the ad-administration of the National Association of Motorized Common Carrier Truck Line Employees;

(b) Giving effect to any contract now existing between said Respondents and said National Association of Motorized Common Carrier Truck Line Employees, hereinafter referred to as "the independent Union";

(c) Recognizing the independent Union, or any successor thereof, as the representative of their employees.

2. Take the following affirmative action:

(a) Withdraw all recognition from, and completely disestablish, the independent Union.

(b) Post appropriate specified notices;

(c) Notify the Regional Director within ten days as to what steps were taken to comply.

In addition to the foregoing the order directed the Respondents, H. E. English and O. B. English, doing business as Red Ball Motor Freight Lines, and Sproles-Red Ball Lines, Inc., to:

1. Cease and desist from:

(a) Doing any of the things set forth in 1 (a), (b), and (c) above;

(b) Discouraging membership in the International Brotherhood of Teamsters, Chauffeurs,

Warehousemen & Helpers of America, A. F. of L., by discriminatorily discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire or tenure of employment;

(c) In any manner interfering with, restraining, and coercing their employees in the exercise of their right to self-organization, to form labor organizations, or to join International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, or any other labor organization.

2. Take the following affirmative action:

(a) Withdraw all recognition and completely disestablish the independent Union.

(b) Offer to J. D. Cranford immediate and full reinstatement to his former, or substantially equivalent, position, without prejudice to his seniority and other rights and privileges;

(c) Make whole J. D. Cranford and F. L. Thomas for any loss of earnings;

(d) Post notices;

(e) Notify Regional Director of action taken within ten days.

The members of the independent Union have hired counsel to urge upon us their desire to retain their Union which has served them satisfactorily as a bargaining agent over a period of some ten or twelve years, and we have sought to carry out their wishes and to lay out a pathway down which Section 157 of Title 29, U. S. C., might move and function according

to its wording[1] and apparent purpose, viz., to permit employees—as distinguished from boards and unions —to choose their own bargaining agent. Under this section these employees, through their counsel, implored us to allow them to retain their Union despite all imputations of the illegitimacy of its birth, but the authority to grant that request has been placed in the National Labor Relations Board by Congress according to impelling judicial construction, and this Court cannot usurp the functions of the Board as to the means whereby to purge or prevent unfair labor practices found by the Board under substantial evidence to exist. A union that is conceived in inequity is denied the privilege of reforming and returning according to the vilest sinner under Biblical standards.

Nor does time, that heals many wounds and cures many ills, and that generally allows "the dead past to bury its dead," serve either to dilute or to destroy the erstwhile domination, interference, or over-exuberance of an employer in the matter of the formation, support, and control of an independent union. But like the longevity of other evil that men do, interference, domination, and control seem to live even after the perpetrator's bones have been interred. See N. L. R. B. v. PENNSYLVANIA GREYHOUND LINES, 308 U. S. 261; N. L. R. B. v. FALK CORPORATION, 308 U. S. 453; N. L. R. B. v. SOUTHERN BELL

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[1] Title 29, U. S. C., § 157, is as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

TELEPHONE & TELEGRAPH COMPANY, 319 U. S. 50.

We cannot say that there is not substantial evidence in the record to support the Board's findings that in the dawn of this Union, some ten or twelve years ago, the employers took an all-too active part—not coercively, not threateningly, but by means which perhaps, more effectively let it be known that it was the pleasure of such employers that the employees should associate themselves with the independent Union which Craig, a highly placed employee, had devised.

We are not prepared to say that the cacophony of clamorous circumstances which the Board has heard and heeded, and upon which its orders have been predicated, was without substantiality. Whether same was without preponderant weight, contrary to good labor relations, devoid of justice, the aider and abettor of a ruthless raid on this Union by one larger and more powerful, were matters committed to the wisdom and conscience of the Board.

Nor is it within the province of this Court to prescribe an election wherein the name of the independent union shall be on the ballot by which democratic process the employees might select the union of their choice as their bargaining agent. N. L. R. B. v. FALK CORPORATION, *supra;* N. L. R. B. v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO., *supra.*

There appears, however, to have been no employer intimidation or coercion in the formation of this Union for it is quite clear that the men formed it: (a) after talking to the Regional Director in Texas of the

N. L. R. B., who advised them that they could do so; (b) after making inquiries as to whether or not they could join one of the transportation unions; (c) and after visiting a meeting of a local union in the A. F. of L.

The deficiencies in the complaint, of which the Respondents complain, are without merit. We do not believe that it was the intention of Congress to require the strictness of common law pleading in either the charges or the complaint in such cases.

Let the order of the Board be enforced in its entirety.

APPENDIX II

In The

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 12672

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

vs.

RED ARROW FREIGHT LINES, INC., H. P. BROWN dba BROWN EXPRESS, W. A. JOHNSON dba JOHNSON MOTOR LINES, JOHNSON STORAGE & DISTRIBUTING COMPANY, INC., MERCHANTS FAST MOTOR LINES, INC., H. E. ENGLISH AND O. B. ENGLISH dba RED BALL MOTOR FREIGHT LINES, SPROLES MOTOR FREIGHT LINES, INC., SPROLES-RED BALL LINES, INC., *Respondents*

MOTION TO REMAND PROCEEDINGS FOR FURTHER HEARING AND PROOF ON CHALLENGE TO JURISDICTION AND LACK OF DUE PROCESS OF LAW

TO THE COURT:

The recent opinion of the Supreme Court of the United States in Wong Yang Sung, Petitioner, vs. J. Howard McGrath, Attorney General of the United States, and Watson B. Miller, United States Commis-

sioner of Immigration and Naturalization, decided February 20, 1950, subsequent to the submission of briefs and arguments in the instant proceeding, clearly demonstrates the lack of jurisdiction on the part of the National Labor Relations Board (now Labor Management Relations Board) to issue the order sought to be enforced in the instant proceedings before this court and that the proceedings were without due process of law and contrary to the plain mandate of statute.

ANALYSIS OF SUNG OPINION

This was a habeas corpus proceeding involving the question of whether administrative hearings in deportation cases must conform to requirements of the Administrative Procedure Act, 5 USC # 1001, et seq. The hearing was before an immigration inspector whose duty includes investigation of like cases and the court held that the case should have been conducted before a "hearing examiner" under the provisions of the Administrative Procedure Act rather than before an immigration service examiner who might be both judge and prosecutor.

The court clearly emphasized that the requirements of Section 5 of the Administrative Procedure Act are applicable to proceedings of the nature here sought to be enforced. With respect to the deportation proceedings, the court said:

> "We think that the limitation to hearings 'required by statute' in § 5 of the Administrative Procedure Act exempts from that section's application only those hearings which administrative

agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency.

"Indeed, to so construe the Immigration Act might again bring it into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality. A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to life itself. It might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake."

By the same reasoning as applied by Mr. Justice Jackson in the Sung case, the proceedings here before the court involve issues basic to human liberty and happiness, and the right of employees to choose their own bargaining agency.

The Sung decision sets at rest once and for all the contention of the Attorney General of the United States

in *Attorney General's Manual on the Administrative Procedure Act* prepared by the United States Department of Justice (1948) and clearly emphasizes that Section 5 of the Administrative Procedure Act applies to proceedings such as is now pefore this court.

APPLICATION OF ADMINISTRATIVE PROCEDURE ACT TO THE INSTANT PROCEEDINGS

Section 5 (c), Administrative Procedure Act (5 USC 1005) provides:

> "(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, fa-

cilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency."

The proceedings before the National Labor Relations Board and its examiner out of which the case at bar arose are all based upon charges of "unfair labor practices" under 29 USC 158 (1) and (2) and adjudication is required by 29 USC 159 and 160 "to be determined on the record after opportunity for agency hearing."

In connection with this Motion, the following dates are pertinent: On November 4, 1946, the consolidated complaint was issued by the National Labor Relations Board upon which the instant proceeding was ultimately founded. Hearings were held by Examiner Victor Hirshfield of the National Labor Relations Board from December 3, 1946 through March 8,, 1947. On June 10, 1947, the intermediate report by Examiner Hirshfield was dated. The decision and order of the National Labor Relations Board is dated May 25, 1948. Under the provisions of Section 12, Administrative Procedure Act (5 USC 1012), the Act, with the exception of Sections 7, 8 and 11 took effect 90 days after its approval or on September 11, 1946. Therefore, Section 5 of the Administrative Procedure Act was effective prior to the initiation of this proceeding and all sections of the Act became effective prior to the decision and order of the National Labor Relations Board.

While it is evident from the record before the court

that all of the provisions of the Administrative Procedure Act, including Sections 7, 8 and 11, were not effective prior to the initiation of the proceedings involved in the order of the Board at bar, nevertheless Section 5 was effective prior to the initiation of these proceedings and, consequently, any proceeding in violation of the provisions of Section 5 of the Administrative Procedure Act is contrary to statute and deprives these respondents of their right of due process of law.

The proceedings before the Senate Judiciary Committee in June, 1945, *Legislative History, Administrative Procedure Act* (79th Congress), page 43, contains the following statement in explanation of the concluding clauses of Section 12, Administrative Procedure Act to the effect that "no procedural requirements shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement" and is conclusive that it was the legislative intention therein that Section 5, being effective September 11, 1946, was applicable to these proceedings initiated by the filing of a complaint by the Board on November 4, 1946:

> "This section includes provisions respecting the construction and effect of the measure. * * * It should be noted, moreover, that the effective date of the proposal is postponed for periods of time sufficient to afford agencies ample opportunity to revise their practices as required; and the proposal is not to have retroactive effect as to proceedings 'initiated or completed prior to the effective date' of any requirement."

In the same work at page 281 is contained the proceeding of the report of the House Judiciary Committee as follows:

> "The word 'initiated' in the final clause of the section means a proceeding formally begun as by the issuance of a complaint by the agency (irrespective of prior charges or investigation) or of notice of a rule-making hearing. As to new cases, the effective dates provided in Section 12 are deferred longer so far as Sections 7 and 8 are concerned in order to afford agencies ample time to prepare and make any adjustments required in their procedures. The selection of examiners under Section 11 is deferred for a year in order to permit present military service personnel an opportunity to qualify for these positions."

Since Section 5 (c) was effective as of the time of the initiation of these proceedings, its provisions must be complied with. There is nothing apparent in the orders that would indicate that there was not a separation of functions, but the discussion of Gerard D. Reilly, a former member of the National Labor Relations Board, in "The Labor Board and The Administrative Procedure Act" in *The Federal Administrative Procedure Act and the Administrative Agencies*, covering proceedings of an institute conducted by the New York University of Law on February 1-8, 1947, at page 476, discusses a possible failure in that connection.

> "Section 5 c relates to separation of functions as between hearing officers, and officers and employees who engage in prosecuting an investigative function. The Board concluded that this sub-

section was satisfied under the organizational structure, which I have described, which makes the trial examining division a separate autonomous unit. The second sentence of Section 5 c to the effect that hearing and decisional officers may not engage in *ex parte* consultation on facts at issue, has been construed by the board as merely prohibiting such officers from consulting persons *ex parte* in order to obtain factual evidence, but not as precluding them from conferences or consultations with assistants and colleagues not identified with the investigation or prosecution of the case.

"While this is not an unreasonable construction, I have always felt myself that the internal practice of the board which requires a trial examiner to submit his report in draft form to the supervisory staff of the trial examining unit, is not a sound one. It injects the influence of other employees, no matter how well intentioned, who have not had the opportunity of seeing the witnesses or appraising their credibility. Moreover, it creates the possibility of bringing the attention of the trial examiner to certain legal arguments to which the parties may not have adverted. Since the trial examiner is held out by the board as having final responsibility for everything which is in his report, including the findings of fact and conclusions of law, the best administrative practice would seem to suggest that the trial examiner prepare and issue his report without consultation unless the parties affected by these consultations are given an opportunity to present their views."

Respondents allege that in the instant proceedings before the Board there was no compliance with Section

5 (c), but, on the contrary, the trial examiner engaged in ex parte consultation on the facts at issue with staff members of the National Labor Relations Board, engaged in ex parte consultation on the facts at issue with the attorneys and representatives of the A. F. of L. Union, engaged in ex parte consultation on facts at issue with the attorney for the Board representing the Board as the prosecutor in such proceedings, consulted with other employees of the Board relative to the form of his report and findings and conclusions therein, and prior to the service of said report, submitted a draft thereof to representatives of the Board for approval, so that there was not a separation of functions as required by Section 5 (c) of the Administrative Procedure Act, nor did such examiner's report represent the independent views of the trial examiner.

Respondents have no adequate remedy at law by which challenge to the jurisdiction, lack of due process and proof thereof may be made. No procedure is provided by law after issuance of a Board order by which respondents may make proof of the matters and things herein alleged, all of which occurred subsequent to hearing hereon. The only remedy to these respondents and the only method by which these respondents may be accorded due process of law and an opportunity to establish the allegations of lack of jurisdiction and lack of due process is for this court to remand these proceedings to the Board for further hearing, and to afford these respondents an opportunity to make proof of the matters herein alleged.

CHALLENGE TO JURISDICTION MAY BE MADE AT ANY STAGE OF PROCEEDING

The rule is fundamental that a jurisdictinal question may be raised at any stage of the proceeding. *Central States Co-ops v. Watson Bros. Transp. Co.* (C. A.-7, 1947), 165 Fed. (2d) 392, rev. on other grounds 93 L. Ed. 1474; *Grace v. American Central Ins. Co.* 27 L. Ed. 932; *Mansfield, C. & L. M. R. Co. v Swan,* 28 L. Ed. 462; *Mattingly v. Northwestern Virginia R.* Co., 39 L. Ed. 894; *City of Gainesville v. Brown-Crummer Investment Co.*, 72 L. Ed. 781; *Treiner v. Sunshine Mining Co.*, 84 L. Ed. 85; *Texas v. Florida,* 87 L. Ed. 817; *U. S. v. Currick,* 80 L. Ed. 1263; *Mitchell v. Maurer* 79 L. Ed. 338.

In the case at bar, the action complained of which deprived the Board of the right to enter a valid order and of this Court to enter its judgment for enforcement of such order transpired subsequent to the hearing before the Board's representative. The acts complained of by respondents herein are those alleged to be in violation of 5 U. S. C 1005 (c) (Sec. 5, Administrative Procedure Act), and respondents contend such statute deprives the Board and Court of jurisdiction to enforce such order in light of the proceedings of the Board in connection therewith. Thus, the applicable rule is as set forth in *N. L. R. B. v. Hearst Publications,* 88 L. Ed. 1170:

> "Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to re-

solve, giving appropriate weight to the judgment of those whose special duty it is to administer the questioned statute. Norwegian Nitrogen Products Co. v. United States, 228 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796; United States v. American Trucking Ass'n., 310 U. S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345 (Niagara Falls Power Co. v. Federal Power Commission, 2 Cir., 137 F. 2d 787)."

The same fundamental rule that a jurisdictional question may be rased at any stage of the proceeding is applicable in a proceeding to enforce an administrative order. *N. L. R. B. v. Hearst Publications*, 88 L. Ed. 1170; *Walling v. Baltimore Steam Packet Co.*, 50 Fed. Supp. 639; *Crowell v. Benson*, 76 L. Ed. 598; *Wichita R. & Light Co. et al v. Public Utilities Comm. et al*, 67 L. Ed. 124; *L. & N. R. Co. v. Finn et al*, 59 L. Ed. 379.

WHEREFORE, respondents pray that this Motion be in all things granted and that this court remand these proceedings to the Board for further hearing and to permit the respondents to make proof of their allegations with respect to lack of jurisdiction and lack of due process of law.

Respectfully submitted,

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APPENDIX III

TEXAS STATUTES AS TO AFFIDAVITS:

Art. 26 (1):

"1. All oaths, affidavits, or affirmations made within this State may be administered and a certificate of the fact given by:

a. A judge, clerk, or commissioner of any court of record;

b. A notary public;

c. A justice of the peace;

d. Any member of any board or commissioner created by the laws of this State, in matters pertaining to the duties thereof."

Art. 302, Penal Code:

"Perjury is a false statement, either written or verbal, deliberately and wilfully made, relating to something past or present, under the sanction of an oath, or such affirmation as is by law equivalent to an oath, where such oath or affirmation is legally administered, under circumstances in which an oath or affirmation is required by law, or is necessary for the prosecution or defense of any private right, or for the ends of public justice."

Art. 304, Penal Code:

"The oath or affirmation must be administered in the manner required by law, and by some person duly authorized to administer the same in the matter or cause in which such oath or affirmation is taken."

Art. 360, Penal Code:

"If any notary public or other officer authorized by law, shall give a false certificate for the purpose of authenticating any instrument of writing for registration, he shall be confined in the penitentiary not less than two nor more than five years.